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No. 04-287

Supreme Court, U.S.
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In The
Supreme Court of the United States

THE CITY OF MARYSVILLE,
A WASHINGTON MUNICIPAL CORPORATION,

Petitioner,

v.

VINE STREET COMMERCIAL PARTNERSHIP,
A WASHINGTON GENERAL PARTNERSHIP, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington, Division I

REPLY IN SUPPORT OF THE CITY OF MARYSVILLE'S PETITION FOR A WRIT OF CERTIORARI

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REASONS THE WRIT SHOULD BE GRANTED

The constitutional issue presented in this Petition is whether a plaintiff has a civil rights claim based solely upon a violation of the Contract Clause. Almost 120 years ago, in *Carter v. Greenhow*, the Supreme Court declared that the "only right" secured to a plaintiff by the Contract Clause was the right to declaratory relief, *i.e.*, the "right to have a judicial determination declaring the nullity of the attempt to impair its obligation."[1] But this Court has never specifically addressed the issue of whether a plaintiff has a civil rights claim based on a violation of the Contract Clause. Because the lower courts are in conflict over this issue, and it is of substantial importance to state and local governments, the City of Marysville respectfully asks the Court to grant certiorari and settle this specific issue once and for all.

RESPONSE TO ISSUES RAISED BY VINE STREET

1. The Decision On Appeal Is In Conflict With A Previous Decision Of This Court.

Ignoring *Carter v. Greenhow*, Vine Street asserts that the Washington State Court of Appeals' opinion in *Vine Street II* does not conflict with any decision of the United States Supreme Court. First, Vine Street surprisingly claims that this Court decided the issue presented in this Petition in its 1991 decision of *Dennis v. Higgins*,[2] asserting "the *very reason* that this Court accepted review in *Dennis* was to resolve the *very question* that the Petitioner

[1] *Carter v. Greenhow*, 114 U.S. 317, 322 (1885).

[2] *Dennis v. Higgins*, 498 U.S. 439 (1991).

contends is yet unresolved."[3] Vine Street appears to have their constitutional clauses mixed up. The question presented in *Dennis* was "whether suits for violations of the *Commerce Clause* may be brought under . . . 42 U.S.C. § 1983."[4] But the issue presented in this Petition does not involve the *Commerce Clause*. Instead, the issue presented here is whether plaintiffs are entitled to file suit under §1983 based solely upon a violation of the *Contract Clause*.[5] This issue was not decided by the Court in *Dennis*.

Second, Vine Street disregards the fact that *Vine Street II* conflicts with this Court's decision in *Carter v. Greenhow*. Vine Street contends that *Carter* is inapplicable because the plaintiff in *Carter* had not filed a Contract Clause claim. While it is true that the plaintiff had not attempted to "litigate his rights" under the Contract Clause, the Supreme Court in *Carter* took the opportunity to define what those rights were. The *Carter* Court explicitly stated that under the Contract Clause, a plaintiff "has a right to have a judicial determination declaring the nullity of the attempt to impair its obligation. **This is the *only right* secured to him by that clause of the Constitution.**"[6]

In rendering this decision almost 120 years ago, the *Carter* Court utilized the same analysis this Court recently

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[3] Opposition Brief, pp. 3-4 (emphasis added).

[4] *Dennis*, 498 U.S. at 440 (emphasis added).

[5] *See Petition for Certiorari*, page i.

[6] *Carter*, 114 U.S. at 322 (emphasis added).

relied upon in *Golden State v. Los Angeles*,[7] *Dennis v. Higgins*,[8] and *Gonzaga University v. John Doe*.[9] In these cases, this Court employed a two-part test to ascertain whether a statutory or constitutional violation can be remedied under §1983. Under this two-part test, the Court must first determine whether the plaintiff has "assert[ed] the violation of a federal right."[10] Based on *Carter*, Vine Street cannot meet the first part of this test.

In *Carter*, this Court stated, without reservation, that the Contract Clause does not confer any individual "rights" on plaintiffs:

> How and in what sense are these rights [contract rights] secured to him by the constitution of the United States? The answer is, by that provision, article 1, § 10, which forbids any state to pass laws impairing the obligations of contracts. **That constitutional provision, so far as it can be said to confer upon or secure to any person *any individual rights*, does so only *indirectly and incidentally*.** In any judicial proceeding necessary to vindicate his rights under a contract affected by such legislation, **he has a *right* to have a judicial determination declaring the nullity of the attempt to impair its obligation. This is the *only right* secured to him by that clause of the constitution.**[11]

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[7] *Golden State Transit Corporation v. Los Angeles*, 493 U.S. 103 (1989).

[8] *Dennis v. Higgins*, 498 U.S. 439 (1991).

[9] *Gonzaga University v. John Doe*, 536 U.S. 273 (2002).

[10] *Golden State*, 493 U.S. at 106.

[11] *Carter*, 114 U.S. at 322 (emphasis added).

Thus, the Washington Court of Appeals' decision in *Vine Street II*, holding that the Contract Clause conferred a "federal right" on Vine Street that can be remedied under §1983 is in direct conflict with the *Carter* Court's decision that the only "rights" conferred to an individual under the Contract Clause are "indirect" and "incidental."

2. There Is A Division Of Authority On This Issue In The Lower Courts.

Vine Street claims there is no confusion over this issue in the lower courts, but cites only those cases supporting its view of what the law should be. To the contrary, the lower court decisions speak for themselves. While the Fourth Circuit has expressly held that there is no remedy under §1983 for violation of the Contract Clause,[12] the Ninth Circuit recently issued a decision to the contrary.[13] While the Second Circuit[14] and State of Oregon[15] have questioned whether there is any remedy under §1983 for violation of the Contract Clause, both the state courts of

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[12] *Andrews v. Anne Arundel County, Md.*, 931 F. Supp. 1255 (D. Md. 1996), *aff'd*, 114 F.3d 1175 (4th Cir. 1997), *cert. denied*, 139 L. Ed. 2d 489, 118 S. Ct. 600 (1997). Vine Street's response to *Andrews* is that this decision should be ignored because, in Vine Street's opinion, "it lacked any significant analysis of the issue." Opposition Brief, pp. 17-18. On the contrary, the *Andrews* court explicitly stated that it declined "to rule on the basis of a forecast that the Supreme Court will at its first opportunity expressly overrule *Carter v. Greenhow*." 931 F. Supp. at 1267.

[13] *Southern California Gas Co. v. Santa Ana*, 336 F.3d 885 (9th Cir. 2003).

[14] *Haley v. Pataki*, 106 F.3d 478 (2nd Cir. 1997).

[15] *Allen v. County of Jackson County*, 169 Ore. App. 116, 7 P.3d 739 (2000) (*see* concurring opinion authored by Edmonds, P.J.).

California[16] and Nebraska[17] have issued decisions implicitly holding (without any discussion) that a violation of the Contract Clause can be remedied under §1983.

For Vine Street to contend that there is no division of authority on this issue in the lower courts is simply to ignore the obvious.

3. Expansion Of Civil Rights Claims Is An Issue Of Substantial Importance To All State And Local Governments.

Vine Street claims that this issue is irrelevant and of no importance because it has two separate causes of action for damages: (1) a common law cause of action for breach of contract *based upon an unconstitutional impairment*, and (2) a cause of action under §1983 *based upon an unconstitutional impairment*.[18] Vine Street is wrong and is simply raising a red herring in an attempt to sway the Court not to accept review of the discrete constitutional issue set forth in the City's Petition for Certiorari.

First, as set forth in the City's Petition, there is a distinct difference between common law breach of contract and unconstitutional impairment.[19] Those differences need not be repeated here.

Second, Vine Street *never* pled a claim for common law breach of contract, and they do not have a breach of

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[16] *Board of Administration v. Pete Wilson*, 57 Cal. App. 4th 967, 67 Cal. Rptr. 2d 477 (1997).

[17] *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995).

[18] Opposition Brief, pp. 18-19.

[19] *See* Petition for Writ of Certiorari, pp. 17-18.

contract claim in this action. App. 12-13.[20] The *only* damage claim Vine Street pled was under §1983, based upon unconstitutional impairment of a contract. Accordingly, the only issue before this Court is the one set forth in the City's Petition for Review, *i.e.*, whether plaintiffs can pursue a §1983 claim based solely on a violation of the Contract Clause.

Finally, as this Court is likely well aware, the scope of civil rights actions filed against government under 42 U.S.C. §1983 has expanded exponentially in the past 30 years. Whether the scope should, or should not, be expanded further is a decision this Court ought to make, not the Washington State Court of Appeals, or the Ninth Circuit Court of Appeals.

Section 1983 is derived from the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. At the time of its enactment, shortly after the Civil War, the Klan was running rampant throughout the South, and "southern officials were either unwilling or unable to curb the Klan's lawlessness."[21] The Supreme Court recognized that Congress's passage of this federal Act was a direct and proper response to "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights."[22] As Justice

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[20] Vine Street, fearing that the Washington Court of Appeals would follow *Carter v. Greenhow* and dismiss their §1983 claim, argued that they also had a claim for damages under a theory of common law breach of contract. The Court of Appeals summarily dismissed that claim based on the fact that it had not been pled in Plaintiffs' Amended Complaint for Damages.

[21] Rodney A. Smolla, 2 *Federal Civil Rights Act* § 14:2 (3d ed. 2001).

[22] *Wilson v. Garcia*, 471 U.S. 261, 276 (1985).

Kennedy aptly noted in his dissent in *Dennis v. Higgins*, §1983 was "an extraordinary remedy passed during Reconstruction to protect basic civil rights against oppressive state action."[23] The majority in *Dennis* did not disagree with this historical finding.[24]

After its enactment, §1983 lay substantially dormant for nearly a century, until the modern §1983 doctrine began with the 1961 ruling in *Monroe v. Pape*, where this Court held that the defendant police officers had acted "under color of law" within the meaning of §1983, and the plaintiff could proceed with a civil rights claim.[25]

While there is no doubt that §1983 has helped curbed real and harmful civil rights violations, there is also no doubt that in recent years state and local governments have become targets of many unwarranted §1983 claims. Currently, "[p]rivate rights of action based on 42 U.S.C. §1983 are flooding the federal courts."[26] Today, "tens of

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[23] *Dennis*, 498 U.S. at 465 (Kennedy, J., dissenting).

[24] The drafters of §1983 likely did not intend to provide an "extraordinary remedy" to the courts for educated, intelligent, and experienced business men and women, such as the individuals who comprise the partnership in Vine Street. This does not, however, completely forbid its application in the modern world; but it should give the courts pause to consider whether expanding §1983's reach to include the Contract Clause is necessary or appropriate.

[25] *Monroe v. Pape*, 365 U.S. 167, 183-84 (1961).

[26] Wayne McCormack, "Federalism and §1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I," 60 U.Va.L.Rev. 1 (1974). In 1960 (before *Monroe v. Pape* was decided), approximately three hundred actions were filed under the general heading of civil rights. In 1972, approximately eight thousand were filed. *Id.* By the 1980s, the annual number had risen to over 30,000. *See Patsy v. Board of Regents*, 457 U.S. 496, 533 n.20 (1982) (Powell, J., dissenting). In his civil rights treatise, Smolla noted that in 2001, "tens

(Continued on following page)

thousands" of civil rights cases are filed against state and local government every year, and the number is still rising. *Id.* Unfortunately, many of these cases lack merit, as this Court itself has recognized:

> [T]here is increasing sensitivity in the Supreme Court to the possibility that as a result of often being targets of §1983 plaintiffs, state and local government officials are being improperly over-deterred in the performance of their government duties. . . . Implicit in these developing judicial attitudes is the position that the remedies provided by §1983 have become far too wide-ranging in scope and effect.[27]

There is also fear that the courts will become overburdened with §1983 cases of questionable merit.[28] Each of these valid concerns forms the backdrop of the Petition now before the Court.

CONCLUSION

The Court has never expressly decided the important constitutional issue presented in this Petition, *i.e.*, whether suits for violation of the Contract Clause may be brought under 42 U.S.C. §1983. In *United States v. Winstar*,[29] this Court recently acknowledged the division of authority on this issue below. In *Winstar*, the majority

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of thousands of §1983 cases are brought each year, alleging violations of federal constitutional and statutory rights." Smolla, at § 14:7.

[27] Sheldon H. Nahmod, 1 *Civil Rights and Civil Liberties Litigation*, § 1:7, 1:8 (4th ed. 2004).

[28] *Id.* at §§ 1:6 & 1:7.

[29] *United States v. Winstar Corp.*, 518 U.S. 839 (1996).

scolded the dissent for pronouncing that damages were the "exclusive remedy at law for breach of contract," pointing out the obvious remedy of specific performance.[30] Then, citing with approval to *Carter*, the Court also noted an individual's right, under the Contract Clause, to request declaratory relief. *Id.*

But not only did this Court in *Winstar* quote *Carter* with approval, this Court additionally quoted a Stanford Law Review article which "suggested" that "analysis under the Contract Clause is *limited* to declaring the statute unconstitutional," and that the Contract Clause does "not authorize the court to award damages."[31] This Court's choice of the word "suggested" indicates its awareness that this specific issue is unsettled.

Now is the time for the Supreme Court to decide this issue. In 1997, the issue was presented to this Court in *Andrews v. Anne Arundel County, supra*, where the Fourth Circuit held that suits for violation of the Contract Clause could *not* be brought under §1983. The Court denied certiorari in *Andrews*. Since then, both the Ninth Circuit and the State of Washington have issued contrary decisions, allowing §1983 suits to proceed based solely on a violation of the Contract Clause. Additionally, this Court has also decided cases like *Gonzaga University v. John Doe, supra,* analyzing whether federal statutes confer rights enforceable under §1983. In *Gonzaga*, the majority clarified its test as follows:

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[30] *Winstar Corp.*, 518 U.S. at 887, n.32.

[31] *Id., citing* Note, Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modifications of Public Contracts, 36 Stan. L. Rev. 1447, 1462 (1984) (emphasis added).

> **We now reject the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under §1983.** Section 1983 provides a remedy only for the deprivation of "rights . . . secured by the [Federal] Constitution and laws" . . . Accordingly, it is *rights*, not the broader or vaguer "benefits" or "interests," that may be enforced under the authority of that section.[32]

The question here is, does the Contract Clause unambiguously confer a federal *right* on individuals? In *Carter v. Greenhow*, this Court declared that it did not. But the lower courts are not in agreement on how to construe and apply the 120-year-old *Carter* decision. Because of this confusion, and the undeniable importance of this issue, the City requests that its Petition for Certiorari be granted.

RESPECTFULLY submitted this 8th day of November, 2004.

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[32] *Gonzaga University*, 536 U.S. at 283 (italics in original, bold added).